United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original of Affidavit of Mailing

75-1364

To be submitted

B P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1364

UNITED STATES OF AMERICA,
Appellee,

—against—

ROBERT BENNETT SCHWARTZ,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Robert Bennett Schwartz appeals from a judgment of conviction entered in the United States District Court for the Eastern District of New York (Orrin G. Judd, *J.*) on May 30, 1975, after a jury found him guilty as charged in a one count indictment of conspiracy to traffic in heroin and cocaine between August 1969 and April 1971, in violation of Title 21, United States Code, Section 174. Appellant was sentenced to a ten year term of imprisonment and a $20,000 fine. He is currently serving his sentence.

Also charged in this indictment was Dafney Schwartz, appellant's wife. Shortly after pre-trial hearings had commenced (March 24, 1975) but before the jury had been sworn (April 1, 1975) Mrs. Schwartz fled the jurisdiction and has been a fugitive ever since. Judge Judd directed that the trial proceed in the absence of Mrs. Schwartz against both defendants. On April 18, 1975

both appellant and his wife were found guilty by the jury.[1] The same day Judge Judd increased appellant's bail to $150,000 and he has been incarcerated since then.

On this appeal, appellant does not challenge the sufficiency of the evidence. He does, however, make the following claims: (1) that a search warrant and the resulting search of his safe deposit box were illegal; (2) that a federal wiretap order was invalid on several grounds; (3) that appellant was prejudiced by the "delay" in the filing of the indictment; (4) that the proof at trial showed multiple conspiracies and not the single conspiracy alleged in the indictment; (5) that venue was not properly established; (6) that the trial court was prejudiced against appellant's case; (7) that evidence of his extensive financial holdings was improperly admitted; (8) that the receipt in evidence of appellant's affidavit indicating he had been suspended as an attorney was prejudicial error; (9) that he was prejudiced by the evidence of his wife's flight; and (10) that trial court erred in its charge in several respects.

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[1] Under the holding of *United States* v. *Tortora*, 464 F.2d 1202, 1208 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972) the jury's verdict was proper as to Mrs. Schwartz notwithstanding her absence during the trial. Moreover, if Mrs. Schwartz had fled after the verdict, sentencing and the filing of her appeal, the verdict would stand and her appeal would be dismissed with prejudice, even if reversal had been warranted. *United States* v. *Sperling*, 506 F.2d 1323, 1345 n. 33 (2d Cir. 1974). Hence, Mrs. Schwartz seems to have gained an anomalous benefit by fleeing when she did since she will be sentenced and have a right to appeal when she is arrested. Furthermore, in the event that her conviction is reversed, the Government might find it difficult, or impossible, to retry her.

Statement of Facts

1. The Government's Case

A. Introduction

Appellant was at all times during the alleged conspiracy an attorney suspended from the practice of law.[2] The evidence established that for a period of about a year, between August 1969 and July 1970, he and his wife sought and obtained large supplies of heroin and cocaine from sources who imported those substances from outside the country. Appellant dealt primarily through Luis Ureta-Morales (hereinafter "Lucho"),[3] a Chilean, who in turn either obtained the narcotics himself or from another supplier, Juan Besolo. Appellant came to know Lucho through an introduction in May 1970 by Claudina Leiros. Leiros, who had been supplying appellant and his wife with narcotics until she introduced them to Lucho, had been obtaining much of those narcotics from Lucho. After the introduction, however, appellant began dealing directly with Lucho on a multi-kilogram level.

The principal witnesses for the Government were Lucho and Leiros. Lucho testified to a series of meetings with appellant in May 1970 in which he sold or agreed to sell him multi-kilogram quantities of cocaine. Leiros cor-

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[2] Appellant was admitted to the bar of the State of New York in December 1958. On January 11, 1966 he was censured. On December 5, 1967 he was suspended for a period of three years. He was reinstated as an attorney on November 30, 1971.

[3] Ureta-Morales is also known as Sergio Jaramillo and it was under the latter name that he was convicted in 1971 in *United States* v. *Fantuzzi*, 463 F.2d 683 (2d Cir. 1972). Gino Fantuzzi, Claudina Leiros, Carmen ("Kitty") Lopez were also co-defendants in the *Fantuzzi* case. Carmen Estrada testified as a witness for the Government in the Fantuzzi case. Lucho began cooperating with the Government in May 1974.

roborated Lucho's testimony regarding his dealings with appellant and his wife as well as testifying to her own earlier narcotics transactions with Mrs. Schwartz. Hugo Pineda, a distributor of cocaine, testified to meetings he had in May 1970 with Lucho and appellant which corroborated the testimony of Lucho. Carmen Estrada, an associate of Lucho and the Schwartzes, and an informant for the Bureau of Narcotics and Dangerous Drugs, also corroborated the testimony of Lucho and described meetings with appellant and his wife during which they sold her cocaine between December 1969 and May 1970 (1242-43; 1250; 1259).

In addition to the accomplice testimony, wiretap evidence, post-arrest admissions by the Schwartzes and evidence of their large financial accumulations were received in evidence.

B. Claudina Leiros' early dealings with appellant and his wife

Toward the end of October 1969 Dafney Schwartz informed Leiros that she had learned through common friends that Leiros was selling narcotics and that her business was doing well (1042). Mrs. Schwartz also said that she was interested in getting into the narcotics business herself, and asked Leiros for advice on getting started. Leiros explained the mechanics of selling cocaine and advised Mrs. Schwartz to start with a relatively small quantity, specifically one-eighth kilogram. Leiros said that she would sell one-eighth kilogram to Mrs. Schwartz for $1,800 (1046). The next day delivery was made (1053).

Leiros, from the time of that first sale until May 1970 when she was "cut out" by Lucho and appellant, sold increasing quantities of narcotics to Mrs. Schwartz approximately once a month. Thus, Leiros sold another one-eighth

kilogram of cocaine to Mrs. Schwartz in November 1969 and a quarter kilogram in December 1969. Beginning in late December 1969 there were a series of about five transactions of a half-kilogram each. Moreover, in July 1970, after Lucho's arrest, she sold one kilogram of heroin to Mrs. Schwartz on two separate occasions (1085-1086).

C. Lucho's dealings with appellant and his wife

In May 1970 Lucho was in the business of importing large quantities of cocaine from South America and selling it to his customers in New York, including Leiros. On May 9, 1970 he learned that two of his couriers had been arrested and were being detained in Los Angeles. Lucho told Leiros about the problem and as a result she arranged with Lucho to meet a lawyer-friend of hers, appellant, the following day (669, 1097).

On May 10, 1970 Lucho and Leiros went to the Schwartz residence at West 93rd Street in Manhattan where Leiros introduced Lucho to appellant and his wife (671). Lucho began explaining his couriers' predicament in Los Angeles. At first Leiros acted as an interpreter between the Spanish-speaking Lucho and appellant. However, after a few moments, Lucho and appellant discovered that they both knew sufficient Italian to speak to each other. In Italian, appellant, who was still under the order of suspension by the Appellate Division (*supra* at 3 fn. 3), told Lucho that he would look into the matter of the couriers' detention and asked Lucho to return on the following day alone (677; 1089-92).[4]

As agreed, on May 11 Lucho alone returned to the Schwartz house. Appellant informed Lucho of what he had learned about the couriers' bail status. He told

[4] Lucho testified in Italian as to the conversations between himself and appellant. He testified in Spanish as to all other conversations.

Lucho, however, to make no effort to post bail until they could determine whether the couriers were cooperating with the Government.

After disposing of that matter, appellant told Lucho that he was aware that Lucho was selling cocaine to Leiros. Appellant then asked Lucho whether he would be willing to eliminate Leiros as a middleman and sell directly to appellant and his wife since he and his wife knew that they were already buying Lucho's cocaine through Leiros (693).

At first Lucho balked. In an effort to persuade him appellant insisted that Lucho look at the highly diluted cocaine the Schwartzes were receiving from Leiros. Mrs. Schwartz went to the upstairs bedroom and returned with a plastic bag containing approximately one-half kilogram of cocaine. Appellant took a sample from the bag and placed it on a table for Lucho to examine (684-685). After rubbing it between his fingers, Lucho told the Schwartzes that he could tell that the cocaine had indeed been cut. Appellant told Lucho that he was sure the cocaine Lucho would sell him and his wife would be pure and that he was willing to pay Lucho the same amount, $10,500 per kilogram, that he had been paying Leiros and more than Lucho was receiving from Leiros. Appellant assured Lucho that their business dealings would be smooth; that he would purchase "ten, fifteen, twenty kilos"; and that he would make payment within two days after receiving the narcotics provided the cocaine was satisfactory. Lucho agreed and told appellant he was expecting a large shipment (it was to be imported through Texas) of cocaine within a week to ten days and that appellant could have ten or fifteen kilograms from the shipment. Appellant gave Lucho his telephone number and Lucho left (656).

Thereafter Lucho went to the San Remo Restaurant in Manhattan where he met one Juan Besolo, another

narcotics trafficker (687). Besolo told Lucho that Hugo Pineda, one of Besolo's salesmen and also an acquaintance of Lucho's to whom Besolo had given five kilograms of cocaine to sell for him, had been unsuccessful in selling the cocaine and that Besolo therefore needed a customer. Lucho said that he had a customer and Besolo said that five kilograms were immediately available (690).

Lucho then telephoned appellant and arranged to meet him at his residence that night. As a result Lucho met appellant and his wife and together they went to the second floor of the Schwartz house to speak privately because there were guests in the living room. Lucho told appellant that he had five kilograms of cocaine and that he would deliver them to the Schwartzes the following day. Appellant agreed but said that he was also interested in purchasing heroin. (Appellant stated that, as a matter of fact, his guests in the living room were interested in purchasing heroin). He told Lucho that he was willing to pay $18,000 per kilogram of heroin. Lucho told appellant that he was not a regular dealer in heroin but agreed to ask his friends whether heroin was available. Appellant and Lucho agreed that Lucho would bring the cocaine between 6:00 and 7:00 P.M. the following day (693).

The arrangements for the delivery to appellant having been made, Lucho returned to the San Remo Restaurant where he again met Besolo. Lucho agreed to pick up the cocaine from Besolo at 6:00 P.M. the following evening (694-695).

The next day, May 12, Lucho met Besolo at 6:00 P.M. at the San Remo Restaurant. Lucho and Besolo went to a nearby apartment in Manhattan where Lucho was given two kilograms of cocaine. The other three kilograms, according to Besolo, were unavailable. Lucho took the two kilograms to the Schwartz residence where he delivered them to appellant and Mrs. Schwartz. It was

agreed that payment of $21,000 would be made at the Schwartz residence the following evening and that efforts would be made to get the remaining three kilograms (704).

Lucho returned to the Schwartz residence the following evening and again met appellant and his wife. Appellant paid Lucho $21,000 in cash (706). Lucho then drove to the San Remo Restaurant where he gave Besolo $19,000 for the two kilograms, keeping $2,000 as a commission for himself (713).

On about May 22 Pineda told Lucho that he would have the remaining three kilograms of cocaine the next day. Lucho then called appellant, told him of the remaining three kilograms and they agreed to meet the next evening.

On May 23, after receiving the three kilograms of cocaine from Pineda, Lucho went to the Schwartz residence (723). Appellant accepted the cocaine and agreed to pay within a few days. He also asked when he would be receiving the larger quantities they had discussed when they had first met some two weeks before (635, 723). Lucho stated that the shipment had not yet arrived.

Later that evening Lucho met Pineda and Besolo at the San Remo Restaurant and assured them that payment for the three kilograms would be made shortly. Besolo told Lucho that after payment was made, he would have ten more kilograms of cocaine for Pineda and Lucho to sell (727-728). While they were at the restaurant Lucho received a call informing him that he would have to travel to Texas to pick up the large shipment he had been expecting (753-754). Lucho told Besolo and Pineda that if they wished to sell Besolo's ten kilograms to Lucho's customer it would be necessary for Pineda to meet the customer inasmuch as Lucho had to leave New York.

Lucho then called appellant who agreed to meet Pineda that night (754).

Lucho, accompanied by Pineda, then went to the Schwartz residence, introduced Pineda to appellant and told appellant that ten kilograms of cocaine were available. Lucho also said that Pineda would handle that transaction while Lucho was out of town arranging for transportation of the Texas shipment they had earlier discussed. Appellant accepted this arrangement and also made partial payment for the three kilograms he had received earlier. After that Lucho and Pineda left (759).

The next day, May 25, Lucho flew to Dallas. Two days later Lucho and others were arrested in Dallas shortly before Lucho was to receive forty-six kilograms of cocaine.[5] The cocaine, however, was not seized. On May 29 Lucho made bail and returned to New York (769).

Shortly thereafter Lucho met Pineda who explained to him that while Lucho had been in Texas, immigration authorities had ordered Pineda to leave the United States by May 30, the next day. Pineda also said that when he had learned this, he had gone to appellant to receive the remaining money still owed by appellant for the three kilograms of cocaine but that appellant had refused to give Pineda any money unless Lucho was present. Lucho then arranged to go to the Schwartz residence the next day.

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[5] Lucho's girlfriend's (Kitty Lopez) telephone had been tapped and it was known by drug authorities that a substantial shipment (44 to 46 kilograms) was to be brought in by air through Texas under Lucho's guidance. Lucho was prematurely arrested in Texas as he left his hotel on the way to pick up the shipment.

The next day, May 30, Lucho, Pineda, as well as Leiros met with appellant and his wife at their house. Appellant paid Lucho the $21,000 he still owed for the three kilograms. When appellant asked Lucho about the ten kilograms Lucho told him that there had been no delivery because the seller of the ten kilograms, Besolo, had become fearful when he learned that Lucho had been arrested. Lucho nevertheless assured appellant that the large cocaine shipment that he tried to retrieve in Texas had not been seized, and that appellant would receive a share of it as soon as the cocaine arrived in New York (772-780; 1096-1098).

On June 5, Lucho learned that the Texas cocaine shipment had arrived in Westchester County. The following day he told appellant that fifteen kilograms were available to him but that someone else would make delivery in view of Lucho's precarious position. Appellant agreed to make payment in $100 bills (797-798).

On June 9, Lucho was arrested by federal agents in connection with the Texas shipment and before delivery could be made to the Schwartzes.

D. Appellant's narcotics involvement as shown by other evidence in the case

Anthony Bocchichio, a Special Agent with the Drug Enforcement Administration, related a post-arrest conversation with appellant held in the United States Attorney's Office during which appellant admitted not only knowing Lucho but also that Lucho had offered to sell him two kilograms of cocaine. Appellant stated, however, that he had refused Lucho's offer (1596).

Additionally, evidence of financial accumulations by the Schwartzes was received. This consisted of $75,000 in cash, various bank money wrappers and the deed to an

estate in Jamaica purchased by Mrs. Schwartz for $210,000 in cash in 1973. These items were seized on December 27, 1974 as a result of the search of the Schwartz safe deposit box at the Chemical Bank. In addition, several conversations intercepted as a result of a Federal wiretap order were received in evidence. These conversations, in part participated in by appellant and his wife, corroborated the testimony of the Government's witnesses.

2. The Defense Case

Appellant did not testify in his own behalf. Nevertheless, fifteen witnesses testified during the defense case. Appellant called seven of them in an effort to prove that he could not speak Italian.[6] Although none of these witnesses spoke Italian, they testified, in essence, that they had never heard appellant speak Italian in their presence. Three Drug Enforcement Administration Agents testified concerning allegedly inconsistent statements made to them by Government witnesses.[7] Appellant also called Gino Fantuzzi, Vladamir Banderas and Francisco Guinart, three narcotics traffickers, all in an effort to impeach the Government's witnesses. Finally, Lucho's wife and Judge Florence Kelly of the New York State Court were also called as defense witnesses. Lucho's wife stated that she had received money from the Government. Judge Kelly testified that appellant was engaged as an attorney in a trial she was conducting the day of his arrest.

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[6] They were Ivan Fisher, Aaron Jaffe, Michael Coiro, Irving Katcher and Edwin Torres, all attorneys, and Marguerita Mensa, an interpreter in French and Spanish.

[7] They were Agents Michael Tobin, John Featherly and Thomas Dugan.

ARGUMENT

POINT I

The search warrant issued by the magistrate on December 26, 1974 for the safe deposit box of the Schwartzes was valid. There was no impropriety in the seizure of the contents of the safe deposit box.

Appellant attacks on four grounds the validity of a search warrant issued by United States Magistrate Harold Raby, Southern District of New York, on December 26, 1974, authorizing the search of the Schwartz safe deposit box at the Chemical Bank. He contends (1) that paragraph 2 of the agent's affidavit supporting the warrant contained a material misstatement; (2) that the affidavit was stale; (3) that the scope of the search was overly broad; and (4) that the seizure of certain documents in connection with the search violated his right not to incriminate himself under the Fifth Amendment. The background for the search warrant is as follows:

On December 10, 1974 appellant and his wife were indicted for conspiracy to traffic in narcotics. On December 14, 1974 both of them were arrested. On December 26, Special Agent John P. Cipriano of the Drug Enforcement Administration filed an affidavit with Magistrate Raby containing the allegedly false paragraph. On the same day, on the basis of Agent Cipriano's affidavit, Magistrate Raby issued five warrants authorizing the search of various safe deposit boxes rented by the Schwartzes in two Manhattan banks. On December 27 the warrants were executed. The search of one of the Schwartz safe deposit boxes, located at the Chemical Bank, revealed that it contained in excess of $75,000 in United States currency, a large quantity of valuable jewelry and documents evidencing worldwide financial holdings by the Schwartzes. These items were seized.

The other four boxes were empty. Appellant's contentions are treated *seriatim*.

1. Paragraph "2" of the supporting affidavit

By motion dated January 31, 1975 the Schwartzes moved in the District Court to controvert the search warrant alleging several grounds in support of their position. The main thrust of their attack was against paragraph 2 of Agent Cipriano's affidavit.[8]

The attack below was based on appellant's claim that he had been promised, during the course of a post-arrest interview, that statements made by him would not be used against him. He further claimed that the contents of paragraph 2 had been divulged by him during the course of that interview and that, therefore, their use in supporting the application for the search warrant constituted a violation of the promise that had been made to him. Judge Judd ruled that this claim was irrelevant inasmuch as "there is enough in the search warrant without reference to income tax deficiencies. A search warrant should not be invalidated because of doubts concerning superfluous statements." (Memorandum decision dated February 18, 1975 attached hereto as an addendum at 1a). Accordingly, Judge Judd denied appellant's motion.

Appellant now seeks to attack paragraph 2 on a ground completely different from that asserted below, contending for the first time that Agent Cipriano "lied"

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[8] Paragraph "2" states: "Investigation by your deponent reveals that neither Robert Bennett Schwartz nor Dafney Schwartz has filed an income tax return since at least 1968. Moreover, Dafro Realty and Construction Corporation has not filed an income tax return since at least 1968."

in paragraph 2 because the "investigation" Agent Cipriano refers to was a conversation with the Assistant United States Attorney in charge of the case. Therefore, the essence of appellant's claim now appears to be that it was misleading for Agent Cipriano to state that he had conducted an "investigation" when the source of information on which his "investigation" was based was the Assistant United States Attorney.

We submit that appellant's new arguments respecting the affidavit are untimely made. As this Court recently stated in *United States* v. *Rollins*, — F.2d — (Slip Op. 6143, 6153; decided Sept. 15, 1975): ". . . [T]he failure to assert before trial a particular ground for a motion to suppress certain evidence operates as a waiver of the right to challenge the admissibility of the evidence on that ground." See also, *United States* v. *Natale*, — F.2d — (2d Cir. Slip Op. 793, 811; decided November 28, 1975). Nevertheless we will treat the merits of appellant's new claim.

The obtaining of tax information about appellant and his wife by Agent Cipriano from the Assistant United States Attorney constituted part of Agent Cipriano's investigation. The Internal Revenue Service agent who was conducting a separate investigation of the Schwartzes filed an affidavit stating that he had notified the Assistant United States Attorney on December 11, 1974 that the Schwartzes had not filed income tax returns at least since 1968. The Assistant United States Attorney conveyed that information to Agent Cipriano.

It is significant that appellant's challenge to paragraph 2 of the affidavit focuses on the accuracy and good faith of the agent's characterization of the source of his information rather than on the accuracy of the information itself. Neither in the District Court nor on this appeal has appellant denied that he failed to file income tax returns since at least 1968 as set forth in paragraph 2. Therefore, appellant's claim at best raises a semantic

rather than a substantive issue, and, in any event, appellant has made no "showing of falsehood or other imposition on the Magistrate." *United States* v. *Dunnings*, 425 F.2d 836, 840 (2d Cir. 1969), *cert. denied*, 397 U.S. 1002 (1970). There is absolutely no basis for assuming that had the Magistrate known of the source of the information he would not have issued the warrant. *United States* v. *LaVecchia*, 513 F.2d 1210, 1217-18 (2d Cir. 1975). On the contrary, there is every reason to believe that the Magistrate would have found the Assistant United States Attorney to be a most reliable source. *United States* v. *Ventresca*, 380 U.S. 102, 110-11 (1965).

Accordingly, this contention is meritless.

2. Staleness of the information in the supporting affidavit

Appellant also claims that the information in Agent Cipriano's affidavit was stale and that the search warrant issued by Magistrate Raby was therefore illegal.

Paragraph "8" of the affidavit revealed to the Magistrate that the Schwartzes were still engaged in narcotics trafficking at the time the search warrants were issued. Moreover, paragraphs "3", "4", "5" and "7" set forth information that between January 1973 and June 1974 Mrs. Schwartz was constantly using various banks, including the Chemical Bank, to launder large quantities of cash. Finally, paragraph "6" of the affidavit advised the Magistrate that on December 16, 1974, ten days before the issuance of the warrants and within hours of the deadline imposed by Judge Judd for the posting of $25,000 bail by Mrs. Schwartz, she attempted to enter the Schwartz safe deposit box at the Chemical Bank but was denied access to it because the box had been sealed as a result of Internal Revenue Service action.

Accordingly, Magistrate Raby had ample cause to believe that the search was based on current information and appellant's "staleness" claim is baseless.

3. Scope of the search

Appellant also attacks the search of the Chemical Bank safe deposit box as overly broad. More specifically, he alleges that because the warrant authorized the seizure only of "large quantities of United States currency" the seizure and introduction into evidence of a deed to an estate in Jamaica, West Indies, that indicated that the estate had been purchased by Mrs. Schwartz for $210,000 in cash was beyond the authority of the warrant and therefore illegal.[9]

Appellant further alleges, apparently in an attempt to prove a premeditated plan by the Government to use the search warrant as a pretext to seize everything found in the safe deposit box, that Grand Jury subpoenas had been issued to the bank requiring the production of the identities of the safe deposit boxes rented by the Schwartzes.[10]

Pursuant to the warrant the agents searched the safe deposit box and seized $75,000 in cash. In addition to the cash, the safe deposit box also contained valuable jewelry,

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[9] The $75,000 in cash, bank money wrappers and the deed were the only seized items received in evidence. We fail to see, therefore, the relevance of appellant's challenge to the seizure of the jewelry and other items to his attack on the conviction.

[10] In the District Court, appellant also alleged that the Grand Jury had been abused because Grand Jury subpoenas, as opposed to trial subpoenas, had been served on bank officials after the return of the indictment. Judge Judd rejected this claim finding that the bank officials never appeared before the Grand Jury and had taken advantage of their right to provide information to the Government informally (428).

a deed to an estate in Jamaica, money wrappers and documents evidencing other large financial holdings by the Schwartzes. Only the deed and the money wrappers, however, were received in evidence. Nevertheless, the seizure of all the items was justified under the "plain view" doctrine by which incriminating evidence inadvertently discovered during a search made pursuant to an initial lawful intrusion is subject to seizure. Moreover, seizure of mere evidence, as well as instrumentalities or contraband is also justified. *United States* v. *Rollins*, *supra* at 6154 and cases cited therein.

Appellant's claim that the subpoenas to bank officials requesting the numbers of the Schwartz safe deposit boxes prove the Government's premeditated intention to seize everything found in the boxes is ridiculous. The purpose of learning the identities of their safe deposit boxes obviously was to determine precisely what boxes in the banks were to be searched.

Accordingly, the claim by appellant that the search of the safe deposit box was overly broad is baseless.

4. Self-incrimination

Appellant also contends that the seizure of certain papers in connection with the search of the safe deposit box violated his privilege against self-incrimination.

Of the papers seized from the safe deposit box only the deed to the Jamaica estate was received in evidence. As Mr. Justice Holmes stated:

> "A party is privileged from producing the evidence but not from its production." *Johnson* v. *United States*, 228 U.S. 457, 458 (1913).

Appellant was not compelled to produce the deed and therefore its receipt in evidence did not violate his privilege against self-incrimination. See also, *United States* v. *Beattie*, 522 F.2d 267 (2d Cir. 1975), petition for certiorari filed Nov. 12, 1975 (#75-700).

Accordingly, the claim is entirely without merit.

POINT II

The wiretapping was lawful in all respects.

Appellant challenges the federal wiretap order and post-authorization procedures concerning a tap on the telephone of Carmen ("Kitty") Lopez. Certain conversations of appellant and his wife were intercepted during the tap and received in evidence at their trial. Appellant's challenge is threefold: (1) he claims the issuing judge erred in finding that "normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used"; (2) he claims that lack of minimization rendered the wiretap illegal; and (3) he claims the failure to serve an inventory on him should have precluded the receipt in evidence of the wiretapped conversations.[11]

By way of background, a chronology of the events concerning the wiretap is set forth.

On May 23, 1970 Judge Inzer B. Wyatt, United States District Judge, Southern District of New York, issued an order authorizing a tap on Lopez' telephone for a 15 day period. Judge Wyatt's order was based on an affidavit by Thomas J. Dugan, an agent for the Bureau of Narcotics and Dangerous Drugs. Judge Wyatt's order named

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[11] The same wiretap was challenged by Fantuzzi in 1971, as based on insufficient probable cause. On appeal the contention was rejected as frivolous. *United States* v. *Fantuzzi*, 463 F.2d 683, 687 (2d Cir. 1972).

three persons—Lucho, Fantuzzi and Kitty Lopez—as "well as others yet unknown" as the subjects of the wiretapping. At the conclusion of the authorized period the wiretap was removed. On June 9, 1970 Lucho, Fantuzzi and Lopez were arrested. On June 23, 1970 the Government attorney in charge of the investigation sent a letter to Judge Wyatt notifying him that the subjects named in Judge Wyatt's authorization order had been overheard during the course of the tap and had been arrested. He further notified Judge Wyatt that other persons, including appellant and his wife, had also been overheard. He concluded by requesting that the service of inventories be postponed. Judge Wyatt granted the application and thereafter ordered that inventories be served on Lucho, Fantuzzi and Lopez. They were served with inventories. Judge Wyatt did not order that inventories be served on appellant and his wife.

1. Normal investigative techniques

First, appellant claims that the wiretap was unnecessary because the Government had sufficient information from an informant, Carmen Estrada, concerning the conspiracy. Appellant further contends that the Government knew the wiretap was unnecessary but nevertheless resorted to misleading Judge Wyatt by telling him, in Agent Dugan's affidavit, that the wiretap was necessary because Estrada had refused to testify as a witness.

As indicated by Agent Dugan's affidavit, the conspiracy he sought to investigate was extensive and sophisticated. It involved the large-scale importation of narcotics by many persons from foreign countries. The affidavit further reflected that the informant, Estrada, was in a position to give only limited information about the precise nature of the conspiratorial activities. Furthermore, inasmuch as the object of the investigation was a criminal prosecution, Estrada's refusal as of May 1970 to testify

in court also necessitated the wiretap. See *United States* v. *James*, 494 F.2d 1007, 1015 (D.D.C. 1974). Therefore, ". . . the affidavit herein did contain enough data to permit the authorizing judge reasonably to conclude that other means would be unlikely to succeed . . ." *United States* v. *Steinberg*, — F.2d — (2d Cir. Slip Op. 6438; decided November 10, 1975).

Appellant claims that the fact that Carmen Estrada changed her mind and agreed to testify as a witness for the Government is proof that Agent Dugan knew all along that Estrada would testify and that therefore he deceived Judge Wyatt by telling him that Carmen Estrada would not testify. We submit that the only thing that appellant has proven is that Estrada changed her mind. There is no basis in the record for appellant's assertion of Governmental deceit.

Finally, appellant is precluded from raising this point on appeal because he did not raise it prior to the selection of the jury as required by Title 18, United States Code, Section 2518(10).

2. Inventory

Appellant also claims that Judge Wyatt erred in not requiring service of an inventory on him even though he was not named in the wiretap order.

After the period of authorized interception had expired and before service of any inventories, the Government informed Judge Wyatt of the identities of all known persons who had been overheard. The Schwartzes were listed among those persons. Nevertheless, Judge Wyatt, without specifying his reasons, did not require that inventories be served on the Schwartzes. The Schwartzes were overheard on a relatively small number of conversations inter-

cepted during the course of the tap. Moreover, Judge Wyatt knew that the tapped telephone was subscribed to by Carmen Lopez. Finally, Judge Wyatt knew that the Schwartzes were not named in his authorization order. Therefore, it was not necessary for Judge Wyatt to require inventories to be served on the Schwartzes.

Accordingly, appellant's claim that failure to serve him with an inventory should have resulted in exclusion of the wiretap evidence is baseless.

3. Minimization

Appellant advances a claim of lack of minimization as an additional ground for excluding the wiretap evidence. We submit that this claim is meritless for several reasons.[12]

First, appellant had no standing to assert lack of minimization since he had no privacy interest in the residence where the tapped telephone was located. *United States* v. *Poeta*, 455 F.2d 117, 122 (2d Cir. 1971) *cert. denied*, 406 U.S. 948 (1972).

Second, even assuming that appellant has standing, his claim still fails on its merits. Judge Judd considered the minimization claim, read the log book and concluded that all the intercepted conversations were participated in by at least one of the co-conspirators named in the authorization order and that, accordingly, the agents had the right to overhear all the conversations. Judge Judd further found the subjects of interception order as well

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[12] Additionally, appellant did not timely raise the minimization issue prior to trial as required by Title 18, United States Code, § 2518(10). Accordingly, he is precluded from raising that issue here.

as the Schwartzes were aware of the fact that Lopez' telephone was being tapped during the period of interception (1887, 1939). See *United States* v. *Bynum*, 485 F.2d 490, 501 (2d Cir. 1973). Therefore, Judge Judd was entirely justified in rejecting appellant's minimization contention.[13]

POINT III

Appellant was indicted as soon as the government had a prosecutable case, and he was not prejudiced by the time lapse between the occurrence of the events charged in the indictment and the return of the indictment.

Relying on *United States* v. *Marion*, 404 U.S. 307 (1971), appellant claims that the time lapse between the occurrence of the events charged in the indictment and the filing of the indictment was caused by the Government in an attempt to gain a tactical advantage. More specifically, appellant claims that he should have been indicted in 1970 on the testimony of Carmen Estrada and on the conversations in which he was overheard during the Fantuzzi wiretap. Furthermore, appellant alleges that he was prejudiced because several witnesses became unavailable

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[13] Appellant alleges error resulted from the use during his trial of transcripts of the wiretap conversations that differed from the transcripts prepared in contemplation of the Fantuzzi trial in 1971. The new transcripts were introduced through the interpreters and agents who prepared them. Appellant was given every opportunity to call witnesses as to his version of what the wiretapped conversations were. He called no such witness. Therefore, his claim appears to be that once a transcript is made, even if subsequent listening to the tapes reveals the initial transcript was inaccurate, the Government is bound by its first transcript. That contention is ridiculous especially, as here, when the tape recordings were in evidence and the transcripts were not.

to him because of the pre-indictment delay.[14] A review of the facts leading up to the indictment in this case disposes of this contention.

The evidence possessed by the Government against appellant in 1970 was limited. Carmen Estrada, the only live witness against him at that time, did not have extensive knowledge about his narcotics trafficking activities as evidenced by her testimony in this case. Moreover, the wiretap, while corroborative, did not independently prove the commission of a crime by appellant. It was only in May 1974, approximately three years after Lucho's conviction, that Lucho agreed to cooperate with the Government and that a prosecutable case against appellant was feasible. During the six-month period between the beginning of Lucho's cooperation and the filing of the indictment efforts were undertaken to verify and corroborate the statements that he and others were then making

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[14] A list of these witnesses, and a brief statement about each of them, is as follows:

Jose Landetta: Appellant does not explain how Landetta knew to whom Lucho was planning to sell the Texas cocaine.

James Christian: Appellant claims that Christian was "lost" to him as a result of a self-incrimination claim. Appellant fails to mention that Christian remained silent during the Fantuzzi trial in 1971 in which he was a defendant.

Richard Wheeler: The most that appellant can say about Wheeler is that he was "familiar with the actions of some of the 'Fantuzzi' defendants and the events of 1970." We submit that the vagueness of this proffer evidences its weakness.

Andres Rodriguez: The Government provided appellant with the name of Rodriguez' attorney (1075). Appellant was then in direct contact with the attorney. Furthermore, Claudina Leiros testified that Rodriguez made narcotics deliveries to the Schwartz house, and we are therefore puzzled by appellant's claim that Rodriguez would have aided his case (1047; 1056-1058).

Carmen ("Kitty") Lopez: The name of Lopez' attorney was given to appellant by the Government (2335). Moreover, Lopez was present in Court as a spectator on the day the Schwartz trial began and although appellant knew she was here (24-25), he did not subpoena her. Therefore, his claim that Lopez was unavailable to him is contrary to the facts.

about appellant. When the Office of the United States Attorney was satisfied that these statements were accurate the case was presented to the Grand Jury and the indictment was returned. Therefore under the circumstances it can hardly be said that the Government intended to delay the prosecution in order to gain a tactical advantage. See *United States* v. *Schwartz*, 464 F.2d 499 (2d Cir.), *cert. denied*, 409 U.S. 1009 (1972). Furthermore, as indicated in footnote 14 above, no prejudice has been shown. See *United States* v. *Marion*, *supra*, 404 U.S. at 322-24; *United States* v. *Finkelstein*, — F.2d — (2d Cir. Slip Op. 841, 854; decided December (1975); *United States* v. *Brown*, 511 F.2d 920, 923 (2d Cir. 1975).

Appellant was not entitled to be indicted before the Government had sufficient evidence to prove its case beyond a reasonable doubt. Accordingly, appellant's contention is without merit.

POINT IV

A single as opposed to multiple conspiracies was proved and venue was properly established.

Point Four of appellant's brief is entitled ". . . Prejudicial Variance. . ." However, only one of appellant's claims under this heading—single versus multiple conspiracies—raises a variance issue.

Appellant's contentions concerning Overt Act 2 of the indictment are inaccurately cast as variance claims. First, appellant claims that inasmuch as the only evidence of venue presented to the Grand Jury concerned the acts described in Overt Act 2, the Government could offer only proof of venue at trial that was identical to that presented to the Grand Jury in support of Overt Act 2.[15]

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[15] Appellant does not challenge the sufficiency of the indictment's venue allegation or the sufficiency of the evidence offered to establish venue at trial.

This theory finds no support in the law. In *United States* v. *Downing*, 51 F.2d 1030, 1031 (2d Cir. 1931) Judge Learned Hand stated:

> "Since jurisdiction depends upon where the crime is committed, and it is committed wherever any part of the agreement is performed, the act of performance relied upon need not be the act laid in the indictment."

Therefore, it was entirely proper for the Government to offer evidence of venue at trial that was different from that presented to the Grand Jury.[16] Accordingly, appellant's contention in this regard is meritless.

Second, appellant contends that it was error for Judge Judd to withdraw Overt Act 2 from the jury's consideration. However, it is well established that where a portion of an indictment is not supported by the evidence, and the remaining allegations charge an offense, the unsupported portion may be withdrawn from the jury's consideration. Wright, Federal Practice and Procedure (Criminal) §127 n.4 and accompanying text. Furthermore, it was well within Judge Judd's discretion to determine the method for removing Overt Act 2 from the jury's view, and, indeed, appellant makes no claim that the jury saw Overt Act 2. Therefore, this claim is without basis.

Appellant also claims that the evidence at trial proved multiple conspiracies in contrast to the single conspiracy

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[16] Appellant also claims that the Government did not call Celso Borgono as a witness at trial because it was aware that he had perjured himself in the Grand Jury and it was trying to cover up that perjury. The fact is that appellant was told during the trial that Borgono was the witness in the Grand Jury whose testimony was the basis for Overt Act 2 and appellant chose not to call Borgono as a defense witness (2008).

alleged in the indictment. We submit that a reading of the Statement of Facts disposes of that claim. The evidence established a single conspiracy in that appellant and his wife were in the narcotics business together; that they depended on Lucho and Leiros to supply them with narcotics; and that they were aware of their roles in a large organization where others performed equally important roles. *Contrast, United States* v. *Bertolotti*, — F.2d — (2d Cir. Slip. Op. 6409; decided November 10, 1975).

Accordingly, appellant's multiple conspiracy claim is baseless.

POINT V

The issuing of requests for judicial assistance by Judge Judd on the Government's application did not require him to recuse himself.

Point V of appellant's brief is entitled "The Impartiality of the Trial Judge was Reasonably Called into Question . . . Requiring Recusal . . ." He claims that Judge Judd prejudged the case by issuing requests for judicial assistance, on the Government's application, requesting a court in Germany to obtain financial information about appellant and his wife and to forward that information to the United States. (The requests for judicial assistance and the application of the United States Attorney are attached as an addendum at pages 6a-13a).

Prior to trial, on the Government's application, Judge Judd signed two requests for judicial assistance requesting a German Court to gather financial information for possible use as evidence in the trial. In doing this Judge Judd was merely issuing international subpoenas and his action implied no greater connection with either side of the case than would the issuing of domestic subpoenas. Moreover, no evidence resulting from the letters rogatory was received in the trial.

Accordingly, appellant's contention that Judge Judd should have recused himself after signing the requests for judicial assistance is meritless.

POINT VI

The $75,000 in cash and the deed to the Jamaica estate were properly admitted as relevant evidence of appellant's narcotics activities.

Appellant contends that Judge Judd erred in permitting the introduction into evidence of $75,000 in cash, the deed to an estate in Jamaica, West Indies purchased by appellant's wife in 1973 for $210,000 in cash, and photographs of the estate. The essence of appellant's claim is that the purchase of the estate and the seizure of the cash (December 27, 1974) were so distant in time from the period of the conspiracy as to have no probative value in proving the charge in the indictment.

Judge Judd acted well within his discretion in admitting these items. The fact that the $75,000 was found in the Schwartz safe deposit box, coupled with the seizure of several bank money wrappers some of which bore dates within the period of the indictment, gave rise to the reasonable inference that the cash was either the instrumentality or the fruits of the Schwartz narcotics business. *United States* v. *Tramunti*, 513 F.2d 1087, 1105 (2d Cir.), *cert. denied*, 96 S. Ct. 54 (1975). Judge Judd also acted entirely properly in admitting the deed and photographs of the Jamaican estate. The deed was seized from the safe deposit box rented by appellant and his wife. The large cash purchase of the estate, evidenced by the deed, was relevant circumstantial evidence of the charge in the indictment. Moreover, Judge Judd carefully explained to the jury the limited purpose for which the evidence was received (1726, 1731).

Accordingly, appellant's contention that the financial evidence was erroneously admitted is without basis.

POINT VII

Evidence that appellant had been suspended from the practice of law during the time of the conspiracy was admissible to rebut the false impression appellant tried to create that his relations with the co-conspirators were entirely innocent and based upon a lawyer-client relationship.

Appellant claims that prejudice resulted from the introduction into evidence of an affidavit executed by him to gain re-admission to the New York Bar in November 1971 after a three-year suspension. The affidavit sets forth the fact of his suspension and the grounds for his claim that he was worthy to be reinstated.

The background for the offer into evidence of the affidavit is as follows: Appellant had discharged his attorney prior to the jury selection and was proceeding *pro se*. During the course of his lengthy cross-examination of Lucho, appellant tried to create the impression that his acquaintanceship with Lucho was the innocent result of a lawyer-client relationship (870-872; 905; 943-944).

Thereafter, appellant persisted in his attempt to convince the jury that he was a lawyer who was being falsely accused by former clients. His questions of Claudina Lerios and Carmen Estrada were unambiguously designed to establish that point (1176; 1333).

The Government sought to rectify these false impressions by offering appellant's affidavit. Judge Judd found that just such a misleading impression had been created and admitted it (1688; 1690-1691; Gov't Exhibit 7).

Appellant's claim that the Government opened the door for his cross-examination of Lucho about a lawyer-client

relationship with him is inaccurate. In order to explain to the jury the manner in which Lucho met appellant it was necessary to elicit that their initial meeting concerned Lucho's attempt to help his couriers who had been arrested. Despite the fact that the Government and the witnesses knew appellant had been suspended at the time these meetings took place, the Government sought to avoid interjecting the issue of his suspension and, accordingly, the witnesses testified that they went to see him in his capacity as a "lawyer". Appellant tried to take advantage of the situation and these attempts by him necessitated the Government's response. Accordingly, not only was Judge Judd well within his discretion in admitting the affidavit into evidence but he was required to do so in order to enable the jury to fairly decide the case.

Therefore, appellant's claim that he was prejudiced by the introduction into evidence of the affidavit is without merit.

POINT VIII

It was not error for Judge Judd to charge the jury on misprision of a felony.

Appellant contends that Judge Judd erred in charging the jury on misprision of a felony. Agent Bocchichio testified to appellant's admission that Lucho had offered to sell him two kilograms of cocaine and that appellants failed to report that offer to the police. Appellant claims that since he was alleged merely to have failed to report the offer and did not take affirmative steps to conceal the offer the misprision of felony charge was erroneous.

Paragraph 3 of the indictment charged that one of the objects of the conspiracy was "to conceal the existence of the conspiracy and take steps designed to prevent the disclosure of [the] activities." This amounts to

an allegation of misprision of a felony. See Title 18, U.S.C. §4. The allegation that appellant and his wife took affirmative steps to prevent disclosure of their conspiratorial activities was proved at trial. For example, during a telephone conversation between Dafney Schwartz and "Kitty" Lopez intercepted shortly after "Kitty" and Lucho had returned from Dallas, Mrs. Schwartz warned Kitty not to discuss anything over the phone because, in her words, "the phone it's no good." Moreover, the intercepted conversations contained obviously coded references to conspiratorial transactions which were also established by other evidence. Therefore, there can be no doubt that a primary objective of the conspiracy was to conceal its existence. Accordingly, Judge Judd's misprision of a felony instruction was based on the evidence and he did not err in so charging the jury.[17]

POINT IX

Judge Judd afforded appellant a scrupulously fair trial.

Appellant takes issue with Judge Judd's conduct of the trial alleging that he was prejudiced in favor of the prosecution and that he conveyed that prejudice to the jury. Appellant cites three instances in support of his assertion. The first is the asking by Judge Judd of four questions of Agent Dugan, called by appellant as a defense witness (2510). Judge Judd, during the direct examination of Agent Dugan, had received in evidence a 1970 report stating that Lucho "spoke Spanish only." (2509; Defend-

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[17] Judge Judd appeared to limit the charge to Agent Bocchichio's testimony about appellant's admission that Lucho had offered to sell him two kilograms of cocaine and that he failed to notify the police about the offer. Judge Judd nevertheless went far in defusing the impact of the charge when he told the jury that "many persons don't perform this duty" (2754).

ant's Exhibit VV). Judge Judd then asked Agent Dugan whether anyone had spoken to Lucho in Italian. Agent Dugan said yes and that Lucho could speak Italian (2510). In no way did the Judge's question imply the answer. Nor did Judge Judd know what Agent Dugan's answer would be.

Appellant also takes issue with Judge Judd's question of Agent Dugan as to why the indictment had not been sought in 1970. This question came in the context of repeated attempts by appellant to convince the jury that he had been the victim of a concerted effort on the part of Government agents to prejudice his defense by deliberately delaying the indictment. Nevertheless, when appellant objected to the question Judge Judd sustained the objection (2510).

Finally, appellant cites as additional proof of Judge Judd's prejudice against him that portion of the charge in which he marshalled the evidence concerning appellant's ability, or lack thereof, to speak Italian. Despite the fact that this was a small portion of the whole charge, and despite the fact that Judge Judd was careful to tell the jury that they were the judges of the fact and had right to disregard his marshalling of the evidence on this point, appellant nevertheless contends that it constituted error entitling him to a reversal of his conviction.

A Federal judge clearly has the right to marshall and comment on the evidence, provided that he informs the jury that it is the judge of the facts. Judge Judd at all times, remained well within these bounds. *United States* v. *LaVecchia*, *supra*, 513 F.2d at 1214. *United States* v. *Brandt*, 196 F.2d 653, 655 (2d Cir. 1952). Moreover, we submit that a reading of the entire record will reveal that Judge Judd leaned over backwards to give appellant a fair trial.

Accordingly, appellant's claim that Judge Judd denied him a fair trial is baseless.

POINT X

Appellant was not prejudiced by the receipt in evidence of his co-defendant's flight.

Appellant urges as reversible error the receipt in evidence of his co-defendant wife's flight on the eve of trial. Appellant claims that the evidence of Mrs. Schwartz' flight resulted in prejudice to him because the fates of him and his wife were so inextricably linked that the jury was thereafter unable to independently consider his case. By way of background a brief summary of the events leading to Mrs. Schwartz's flight is set forth.

On December 14, 1974, following their arrests, appellant and his wife were arraigned before Judge Judd. At the arraignment high bail was requested for both defendants because the danger of flight appeared to be substantial. This was especially true in the case of Mrs. Schwartz, both because of her lengthy arrest record including a federal counterfeiting conviction, and also because she was not a United States citizen and was known to have extensive property holdings abroad. Judge Judd set her bail at $25,000 and she posted it on Monday, December 16, 1974. Thereafter Judge Judd fixed March 24, 1975 as the date for trial. After the trial date had been set motions were filed by both appellant and his wife requiring hearings, and it was agreed that the hearings would be held immediately preceeding the jury selection. As a result, on March 24, 1975 the hearings began, and both appellant and his wife were in court.

The herings continued to be held during the next two days also in the presence of appellant and his wife. At the conclusion of the court session on Wednesday, March 26, Judge Judd granted the defense a continuance until Monday, March 31, to give them the opportunity to produce Henry Peterson, a former Assistant Attorney Gen-

eral, as a defense witness on the wiretap authorization. Judge Judd further stated that the trial would begin after the conclusion of the wiretap hearing (469). Mrs. Schwartz was present in court when Judge Judd's instructions were given.

On Monday, March 31, the case was called. Mrs. Schwartz was not present. Judge Judd asked appellant's then counsel where appellant's wife was but counsel stated that appellant had advised him that appellant did not know (480). The same day, after giving the defense an opportunity to determine Mrs. Schwartz' whereabouts and after learning from them that their investigation had turned up no leads, Judge Judd found that Mrs. Schwartz had voluntarily and wilfully absented herself from the trial and ordered that she be tried *in absentia* under the authority of *United States* v. *Tortora*, 464 F.2d 1202, 1207 (2d Cir. 1972). The jury selection then began.

Judge Judd carefully instructed the jury that they were not permitted to use the evidence of Mrs. Schwartz' flight against appellant. Appellant's reliance on *United States* v. *Lobo*, 516 F.2d 883, (2d Cir.), *cert. denied*, 96 S. Ct. 65 (1975) is completely misplaced. That case stands four square against appellant, holding as it does that limiting instructions are fully sufficient to cure any remote *Bruton* type problems which arise when a co-defendant becomes a fugitive during the trial *Lobo*, *supra*, 516 F.2d at 884. The holding of *Lobo* is in no way dependent, as appellant suggests, on the connection between the fleeing defendant and the remaining defendant. Such a rationale would turn the *Lobo* holding on its head permitting closely tied defendants to unilaterally abort joint trials by the simple expedient of fleeing the jurisdiction.

Accordingly, appellant's claim that it was error to admit evidence of his co-defendant wife's flight is without merit.

POINT XI

The charge on the elements of the crime of conspiracy was entirely correct.

The Appellant claims that Judge Judd erred by failing to instruct the jury that they must make a specific finding that the substances that the witnesses identified as heroin and cocaine were in fact heroin and cocaine.

The indictment charged appellant with conspiracy. There is no dispute that Judge Judd clearly informed the jury of the elements of the crime of conspiracy. Inasmuch as the crime of conspiracy does not require the actual dealing in narcotic drugs but merely an agreement to so deal, appellant's point is difficult to fathom. See *United States* v. *Nuccio*, 373 F.2d 168, 174 n. 4 (2d Cir. 1967), *cert. denied*, 392 U.S. 930 (1968).[18]

Accordingly, appellant's claim that Judge Judd erred in this regard is baseless.

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[18] Indeed the direct evidence, including the testimony of Lucho that he tested the cocaine by placing it between his fingers and the testimony of Claudina Leiros that she showed Mrs. Schwartz how to dilute cocaine by mixing it with adulterants as well as the testimony about the large amounts paid for the narcotic drugs, gave the jury more than ample reason to conclude that the substances that were the subject of the various transactions were heroin and cocaine.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: February 6, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
PETER R. SCHLAM,
RICHARD APPLEBY,
ZACHARY W. CARTER,
Assistant United States Attorneys,
Of Counsel.

ADDENDUM

Memorandum Dated February 18, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

74-CR-775

UNITED STATES OF AMERICA,

—against—

ROBERT BENNETT SCHWARTZ and DAFNEY SCHWARTZ,
Defendants.

Appearances:

HON. DAVID G. TRAGER
United States Attorney
Attorney for United States of America

By: PETER R. SCHLAM, Esq.
Assistant U.S. Attorney of Counsel

ALBERT J. KRIEGER, Esq.
Attorney for Defendant Robert B. Schwartz

GILBERT EPSTEIN, Esq.
Attorney for Defendant Dafney Schwartz

JUDD, *J.*

MEMORANDUM

Defendants have moved to controvert the application for a search warrant and to suppress evidence seized under it as well as evidence seized from an automobile occupied by the defendants at the time of their arrest.

No appellate authority specifically holds that a defendant may controvert facts set forth in an affidavit submitted to the magistrate who signs a search warrant.

This court, however, took testimony in *United States* v. *Averell*, 296 F. Supp. 1004, 1016 (1969), to determine whether the information presented to the magistrate was false *to the knowledge of the affiant* in a material respect.

Judge Wyatt stated in *United States* v. *Roth*, 285 F. Supp. 364 (S.D.N.Y. 1965), that he was opposed to an attack on a search warrant for any matters unknown to the magistrate. *See also United States* v. *Halsey*, 257 F. Supp. 1002, 1006 (S.D.N.Y. 1966). Judge Friendly in *United States* v. *Dunnings*, 425 F.2d 836, 840 (2d Cir. 1969), *cert. denied*, 397 U.S. 1002, 90 S.Ct. 1149 (1970), expressed the view that Fourth Amendment policies might be adequately served by forbidding any hearing on the truth of the affidavit, "even though a rare false affidavit may occasionally slip by." Defendants rely on a *caveat* by Judge Lumbard in *United States ex rel. De Rosa* v. *La Vallee*, 406 F.2d 807, 808 (2d Cir. 1969), that the propriety of a search warrant is to be determined solely on the information presented to the issuing magistrate unless it was false to the knowledge of the affiant in a material respect.

In view of the serious nature of the charges and the time that will be invested in a trial, the court has nevertheless examined the material submitted by defendants.

1. The Search Warrant

The search warrant was issued by a Magistrate in the Southern District of New York on December 26, 1974 on the basis of an affidavit by John T. Cipriano, a special agent of the Drug Enforcement Administration, seeking to open safe deposit boxes in two banks in Manhattan. The search warrant referred to the indictment in this case, which charged the defendants with conspiracy to

import quantities of heroin and cocaine into the United States between August 1969 and April 1971, and cited as overt acts their payment of $31,500 to a co-conspirator for three kilograms of cocaine which they received during May 1970. The affidavit also recited that New York police officers reported having seen the defendants go to the United Jersey Bank three times during April and May 1974 to change cash from small bills into large ones and then drive to the banks in which the safe deposit boxes were located. This was described as a common way in which narcotic dealers "laundered" cash. Police officers were quoted as also saying that Dafney Schwartz had been observed going to one of the safe deposit boxes on December 12, 1974, after bail had been set in this case, and before the time when she was to post it. The affidavit also quoted a New York City Police Captain as saying that a reliable informant had reported that both defendants are presently engaged in the narcotics traffic.

The affidavit also recited that no income tax returns have been filed for several years by either defendant or by a corporation of which they were both officers.

The affidavit also stated that the affiant had conferred with officers and tellers at the United Jersey Bank who stated that Dafney Schwartz went there three times a week over an eighteen month period ending in June 1974 to present amounts up to $4,000 to $10,000 in small bills and would receive large bills in return for half the amount and money orders or cashier's checks for the balance.

The last statement is challenged by an affidavit of an investigator for the defendants, who states that a named assistant vice president and two tellers, who refused to give written statements, said they had never mentioned sums of $4,000 to $10,000 and that "There were intervals

of time running several weeks to months when they would not see Mrs. Schwartz at the bank at all during the period in question"; and that the transactions were all at the drive-in window, where such sums of money could not have been handled.

The investigator's affidavit is significant as much for what it leaves unchallenged as for the allegations which it disputes. If the investigator's hearsay affidavit were accepted, it would still appear that substantial amounts of cash were changed into large bills, money orders and checks in a series of transactions spread out over a substantial period of time.

It is not at all clear that interruptions in this course of business, even for a month or more, are significant, or that it is important whether the transactions amounted to $4,000. However, since these statements go to the truth of the affiant's own allegations, the court will hear the bank employees on February 24, 1975, if the defendant produces them under subpoenas served with reasonable diligence.

Insofar as the motion attacks the specificity of the affidavit for the search warrant, the court is satisfied that it meets the requirements of *Aguilar* v. *Texas*, 378 U.S. 108, 84 S.Ct. 1509 (1964) and *Spinelli* v. *United States*, 393 U.S. 410, 89 S.Ct. 584 (1969).

2. Alleged Prosecutorial Promise

Defendants challenge the propriety of the statement in the affidavit for the search warrant concerning their faliure to file income tax returns. The ground for the challenge is that Mr. Schwartz' admission that tax returns were not filed had been made at a conference with

the United States Attorney, held at Mr. Schwartz' request on December 13, 1974, after he was given written assurance "that my discussions with representatives of the Government are intended to determine if my cooperation is truthful and complete and therefore will not be used against me at a later time." An affidavit of an I.R.S. agent asserts that he informed the United States Attorney on December 1, 1974 that defendants had filed no income tax returns. It is not necessary to take the testimony of the I.R.S. agent or to determine whether use of information in support of a search warrant is the type used against the defendant that was forbidden by the agreement. There is enough in the search warrant application to justify the issuance of the warrant without reference to income tax deficiencies. A search warrant should not be invalidated because of doubts concerning superfluous statements.

3. Search of Automobile

Defendants object to the use of items seized from a travel bag and an attache case in the trunk of the car at the time of their arrest, both on the ground that there should have been a search warrant and on the ground that the arrest should have been made somewhere else. The courts have recognized broad powers for the search of a car at the time of arrest. However, the court will hear the arresting agents on February 24, if they are available.

Orrin G. Judd
U.S.D.J.

Request for International Judicial Assistance

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 74 CR 775

UNITED STATES OF AMERICA,

—against—

ROBERT BENNETT SCHWARTZ and DAFNEY SCHWARTZ,
Defendants.

To the appropriate judicial authority in Land Hesse, Federal Republic of Germany:

There is pending within the jurisdiction of this Court a charge of conspiracy to illegally import heroin and cocaine against Robert Schwartz and Dafney Schwartz. The investigation of this case has revealed that large sums of money, believed to be the proceeds of narcotics transactions, have been deposited by the Schwartzes into accounts in the names of Gunther Philipps, Fredrichstrasse 60, Frankfurt, Federal Republic of Germany, in the Dresdner Bank A.G., in Frankfurt. The accounts are numbered 4000900/10, 4000900/20, and 4000500/20.

The records of balances and transactions, such as deposits, withdrawals, currency exchanges, transfers, drafts, and letters correspondence, would be useful to show the volumes of money handled by the Schwartzes during the time of their alleged transactions in narcotics.

It would be most helpful, and in the furtherance of justice, if the appropriate judicial authority of Land Hesse, Federal Republic of Germany, would ask the officials of the Dresdener Bank A.G. to produce, for the use of this Court, the records of transactions in the above-

numbered accounts for the period 1968 through the present.

It is further requested that the records produced be authenticated by having the appropriate official of the bank execute the Certificate of Authenticity of Bank Records attached hereto, signing both the English and German language copies.

The Courts of the United States are authorized by statute, Title 28, United States Code, Section 1782, to extend similar assistance to the tribunals of the Federal Republic of Germany. Such assistance has been, and is being rendered; thus reciprocity is assured.

The Court assures the judicial authorities in the Federal Republic of Germany that any records or exhibits which may be made available pursuant to this request will be promptly returned after they have served their purpose.

Any expenses incurred either by the judicial authorities of the Federal Republic of Germany, or Dresdner Bank, in retrieving, duplicating, and producing these records are guaranteed.

As the trial of this case is set for March 24, 1975, this Court requests that the judicial authorities of the Federal Republic of Germany proceed with the greatest convenient speed possible in fulfilling this request.

The Court takes this opportunity to extend to the judicial authorities of the Federal Republic of Germany its sincere thanks and the assurance of its highest consideration.

ORRIN G. JUDD
United States District Judge
Eastern District of New York

Request for International Judicial Assistance

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 74 CR 775

UNITED STATES OF AMERICA,

—against—

ROBERT BENNETT SCHWARTZ and DAFNEY SCHWARTZ,
Defendants.

To the appropriate judicial authority in Land Hesse, Federal Republic of Germany:

There is pending within the jurisdiction of this Court a charge of conspiracy to illegally import heroin and cocaine against Robert Schwartz and Dafney Schwartz. The investigation of this case has revealed that large sums of money, believed to be the proceeds of narcotics transactions, have been deposited, on behalf of the Schwartzes and into various bank accourts, by Gunther Philips, Friedrichstrasse 60, Frankfurt, Federal Republic of Germany. Mr. Philipps acted as an agent for the Schwartzes in depositing their funds in the Dresdner Bank, Frankfurt, Germany, and in the Bank in Liechtenstein, Vaduz, Liechtenstein. When asked about these transactions, Mr. Philipps said he could not disclose any information unless ordered by a Court to do so, because he is an attorney who was employed by the Schwartzes. Under United States law, a lawyer acting only as a business agent and not as a legal counselor is not free to withhold information about pure business transactions such as these.

Request for International Judicial Assistance

The United States District Court for the Eastern District of New York therefore requests the judicial authorities of Land Hesse, Federal Republic of Germany, to order Gunther Philipps to produce for the use of this Court, all records of banking transactions that he conducted for the Schwartzes in Germany, Liechtenstein or elsewhere. It is further requested that Mr. Philipps be directed to give sworn testimony in response to the following questions:

Did you transfer, maintain control of, buy or sell, any funds or property on behalf of any of the following persons or entities:

Robert Bennett Schwartz

Dafney Schwartz, also known as Dafney Frank

Cladina International Establishment

Dafney International Establishment

If so, please describe the circumstances surrounding each such transaction(s), including the following:

1. the date(s) of the transaction(s).

2. the nature of the transaction(s).

3. the name(s) and address(es) of the persons(s). giving you instructions concerning the transaction(s) and the name(s) and address(es) of persons participating or having any interest in said transaction(s).

4. the manner in which the instructions were communicated to you (i.e. in persons, by telephone, by letter, telegram).

5. the place from which such instructions were communicated to you, and the place where you received such instructions.

6. the nature of the instructions

7. the name(s) and address(es) of any other persons present when such instructions were received by you.

8. all acts performed by you or by any person acting at your direction, including the name(s) and address(es) of any person(s) or business entity(ies) with whom you communicated in connection with these instructions(s) and transaction(s).

9. provide all records and correspondence in your custody and control concerning such instructions and transactions.

It is requested that the documents and transcript of the testimony of Mr. Philipps, together with the records of banking transactions conducted by him for the Schwartzes, be sealed by the judicial authorities and transmitted to this Court via the United States Consular official, Frankfurt, Germany.

The Courts of the United States are authorized by statute, Title 28 United States Code, Section 1782, to extend similar assistance to the tribunals of the Federal Republic of Germany. Such assistance has been, and is being rendered; thus reciprocity is assured.

The Court assures the judicial authorities in the Federal Republic of Germany that any records or exhibits which may be made available pursuant to this request will be promptly returned after they have served their purpose.

Any expenses incurred either by the judicial authorities of the Federal Republic of Germany, or Dresdner Bank, in retrieving, duplicating, and producting these records are guaranteed.

Request for International Judicial Assistance

As the trial of this case is set for March 24, 1975, this Court request that the judicial authorities of the Federal Republic of Germany proceed with the greatest convenient speed possible in fulfilling this request.

The Court takes this opportunity to extend to the judicial authorities of the Federal Republic of Germany its sincere thanks and the assurance of its highest consideration.

ORRIN G. JUDD
United States District Judge
Eastern District of New York

3/17/75

Application for Letters Rogatory

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket No. 74 CR 775

UNITED STATES OF AMERICA,

—against—

ROBERT BENNETT SCHWARTZ and DAFNEY SCHWARTZ,
Defendants.

The United States of America, by David G. Trager, United States Attorney for the Eastern District of New York, applies to the Court, pursuant to Rule 57(b) of the Federal Rules of Criminal Procedure, and Rules 45(b) and Rule 28(b) of the Federal Rules of Civil Procedure, for letters rogatory requesting the assistance of the judiciary of Land Hesse, Federal Republic of Germany, in performing the following judicial acts:

(1) Obtaining ledger cards, signature cards, cancelled checks, statements and/or balances, and letter correspondence pertaining to the accounts of Gunther Philipps in the Dresdner Bank, A.G., Frankfurt, Germany, for the period between January 1, 1968 and the present.

(2) Taking the sworn written statement of the representative of Dresdner Bank, A.G., who produces the documents referred to in paragraph (1), to the truth of the following statements:

(a) These documents are true and exact copies of originals records presently in the custody of the Dresdner Bank, A.G., in Franfurt, Germany.

(b) The original of these copies are kept and maintained in the ordinary course of business of the Foreign Commerce Bank, and in accordance with regular business procedure.

(c) Entries on these documents were made at or about the time of the occurrence of the transactions they record.

The necessity for, and materiality of, this evidence to the preparation of this case are set forth in the detail required by the judicial authority of Land Hesse, Federal Republic of Germany in the attached "Letters Rogatory".

The legal principles and authorities in support of this application are set forth in the memorandum attached hereto, and made a part hereof.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York

★ U. S. Government Printing Office 1976—614—353—181

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 11th day of February 19 76 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Mr. Robert Bennett Schwartz
#83250
P. O. Box 1000
Lewisburg, Penna. 17837

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
11th day of February 19 76

Irene B. Cohen

IRENE B. COHEN
Notary Public, State of New York
No. 24-0603965
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1977

75-1364

B
P/S

FEB 26 1976

UNITED STATES COURT OF APPEALS

For The Second Circuit

UNITED STATES OF AMERICA ,

Apellee

- against -

ROBERT BENNETT SCHWARTZ, et ano

Appellant .

On Appeal from the United States District Court
For The Eastern District of New York

ROBERT B. SCHWARTZ
Appellant pro se
(# 83250)
P.O. Box 1000
Lewisburg , PA. 17837

3

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- -X

UNITED STATES OF AMERICA,

Appellee

-against- APPELLANT'S REPLY BRIEF

ROBERT BENNETT SCHWARTZ,

Appellant.

- -X

Appellant makes the following Reply to the Brief for the government made necessary because it appears that there will be no argument scheduled before this court. Moreover, it is important to focus this court's attention on the obvious failure of the government to meet the legal and factual issues raised in our brief.

The points raised herein are meant to answer the government and to be read along with and in amplification of the matters already set out in the main points of Appellant's Brief.

To make this flow as smooth as possible the following legend has been prepared :

Hereinafter AB refers to Appellant's Brief
AA refers to Appellant's Appendix
GB refers to Appellee's Brief
GA refers to Appellee's Addendum
T- refers to indicated pages of the trial record

Any other sources refered to in this Reply Brief will be appropriately identified.

POINT I THE SEARCH WARRANT GB 13

To understand the full impact of the imposition and deception practiced on the magistrate the following facts should be considered along with those already raised (AB 5-8).

1. On December 23, 1974 before Hon. Judd,J. in 74 C 1805 when Mr. Schlam, then present, is personally accused of violating an immunity promise regarding certain tax deficiencies and with full opportunity to respond on the record by simply stating he had already known this from an earlier, independent,IRS source, Mr. Schlam remained silent. This was before any search warrant application.

2. On or before December 26, 1974, just three days later, when Mr. Schlam prepared the search warrant affidavit for agent Cipriano he was particularly sensitive to this immunity issue regarding alleged tax deficiencies of the Schwartzes. In addition he must have been aware of the universal legal requirement that if hearsay was the source of certain averments in the affidavit, the magistrate to act independently in making his determinations must be supplied with the truth regarding the underlying facts. In that regard Mr. Schlam identifies a hearsay source with amplification, for every allegation in the affidavit (AB 7) except paragraph 2 . He drafts paragraph 2 to induce the magistrate into believing that the facts contained therein came from Cipriano's direct knowledge through his direct investigation. This was not only false and deceptive but this intentional deception reduced the magistrate's function regarding that material averment, to nothing more than a " rubber stamp" .

3. On February 7, 1975 when paragraph 2 is attacked as false and deceptive on the record before judge Judd. Mr. Schlam again with full opportunity to truthfully respond, does not do so. His answer is not direct and forthright but implies that Cipriano got his information directly from IRS. He then pledges to

establish to the court not only the IRS source directly to Cipriano for his information in paragraph 2 but that he would, as the court further directed, document the proof to show when the IRS first made their determination of these facts (AB 6). His proof is a personal affidavit in which he know states for the first time, that he told Ciriano these things based upon information an IRS agent told him on the telephone on December 11, 1974. He attaches an affidavit of IRS agent McCormick which states:

> " I advised Mr. Schlam that my investigation had determined neither Robert Schwartz nor Dafney Schwartz had filed tax returns at least since 1968." (AA items E&F)

Not a single word is mentioned about Dafro Realty Corp.. Not a single item of documentary proof is produced to show that the IRS had in fact, in the regular course of business, determined any tax deficiencies, failures to file or otherwise, regarding the Schwartzes or Dafro Realty Corp.. None of this is disputed by the government.

It was clear that Cipriano never investigated this matter, never spoke to any IRS agent, never saw any IRS documents, never had any direct knowledge of the facts in paragraph 2 except now, couched in hearsay, it is alleged that Mr. Schlam told Cipriano and McCormick had told Schlam. With nothing to show the source, by documents or otherwise,of McCormick's "investigation". Both the facts and the government's failure to address the issue establish that there was no source whatever for the Dafro Realty allegation. However, the government wanted a warrant to search that box and to get the magistrate to issue one, they simply out of zeal, to round out the picture, invented the facts. (AB 7-8)

This entire matter was viewed by the court as"doubtful" but was eliminated from affecting it's consideration which was error(AB 8). The government's present argument that had they told the magistrate the truth he still would have acted

is not only baseless as a matter of fact but frivilous as a matter of law. The magistrate was not only intentionally imposed on, he was lied to by an agent whose affidavit was authored by his partner in deceit, the ass't. U.S. Attorney (AB 5-8).

There is no waiver in raising issues to a court that it by order or direction will not hear or permit examination of. As was the case with this search warrant.

The STALENESS ISSUE is best described in AB 9-11 with the following addendum:

1. The major observations and information in the affidavit ended 6 months or more before the warrant was applied for.

2. Mr. Schlam knew when he included the visit to the bank paragraph in Cipriano's affidavit(AA item C, para.6) he was causing yet another deception on the magistrate. The truth was that Mrs. Schwartz's visit to the bank had nothing to do with posting bail. Her bond had already been executed by one indemnitor, collateral posted, the premium paid and the bondsman in court on December 16, 1974 before judge Judd. The only reason for the delay of one day was that the signature of Albert Kreiger, Esq. was required as an indemnitor and he was coming from Florida to New York and couldn't arrive before the 17th. The attempt ~~the facts~~ in paragraph 6 to create the impression in the mind of the magistrate that the visit to the bank was an attempt to get money from the safe deposit boxes for bail was intentional deception by Mr. Schlam who knew the truth. The visit to the bank was to simply confirm the existance of illegal levies and seizure which formed part of the basis for injunctive relief sought under 74 C 1805 . This civil action was commenced before the warrant was applied for and and was incorporated, in toto, in the general motions to controvert and surpress addressed to the search warrant. It was never considered by the court.

The SCOPE OF THE SEARCH (AB 11) was such that it turned a seemingly precise warrant into a "general warrant" coupled with the mass seizure of everything in the box and is universally condemned. The government makes no reply to the now uncontested fact that upon opening the box and immediately discovering U.S. currency (the specified object of the search) the purpose of the warrant was satisfied. Nor do they answer the issue that the further general exploratory rummaging after the discovery of the specified object of the search turned this into a general warrant (AB 12). United States v. Rollins, at 6154 (GB 17) is inapposite for there the search was continuing in seeking the specified weapon which was never found.

The government seeks to justify this conduct in footnote 9 (GB 16) by admitting we searched and seized everything but only used some of the items at the trial. This is frivilous and a testament to the fact that no justifiable reason existed for the mass search and seizure of these items in the first place. Within the box were " 3 folders", the entire contents of which were some 238 private, personal items(generally described at page 11,AB) that had to be removed for close examination in order to discover just what they were. To permit this conduct would make a mockery of the Fourth Amendment (AB 11-13) .

POINT II THE WIRETAP

POINT III PRE-INDICTMENT DELAY

To fully understand the wiretap and pre-indictment delay issues raised by appellant (AB 14-26) it is necessary to set forth what the government now conceeds it already knew from Carmen Estrada in 1970 :

1. Estrada was a reliable informant who supplied information on 50 verified occasions(United States v. Fantuzzi, 463 F.2d at 687 and n.5) .

2. Estrada told agent Dugan on several occasions that the Schwartzes were involved with the "Fantuzzi" defendants in their narcotics conspiracy activities prior to the wiretap (AB 14; T 1306-07, 2490-93).

3. Estrada is present and testifies to observing several sales of narcotics from the Schwartzes to Kitty and she herself further testifies to having made several buys of narcotics from the Schwartzes in 1970 (T 1242-43).

4. Estrada knew that Kitty, upon whose phone the wiretap was placed, used the phone constantly to contact the Schwartzes regarding narcotics (T 1244-45, 1247-48, 1251).

5. Estrada knows about and is present when Lucho receives payment for narcotics sold to the Schwartzes at a time when additional drugs are purchased from the Schwartzes by Lucho for Kitty and Estrada (T 1252-53).

6. Estrada knew of the Schwartzes interest in Lucho's trip to Texas and their interest in acquiring part of the Texas cocaine (T 1258-59).

7. Estrada knew the Schwartzes had purchased narcotics from Lierros who was getting same from Lucho (see agent Dugan's notes 1970).

In truth one wonders how much more"extensive knowledge" the government would require when viewed together with the additional " Fantuzzi" conspiracy testimony available in 1970 from Estrada. All of which when coupled with the admittedly " corroborative" wiretap evidence against the Schwartzes also available in 1970 is staggering.(GB 23)

We do not raise these issues to show that the Schwartzes had a right to be indicted in "Fantuzzi" in 1970 but to conclusively prove that the government's failure to name them in the wiretap application and notify them thereof coupled with it's decision to delay their indictment was intentional ; whereby the government gained a calculated and decided tactical advantage over them. Additionally, during the more than four and one half year period of intentional delay before an indictment was sought the Schwartzes suffered substantial prejudice to their rights to a fair trial as is more fully discussed herein and in Appellant's Brief.

With these underlying facts in mind we now address the specific points separately.

POINT II THE WIRETAP

In addition to the issues raised pre-trial, for the first time on this trial Carmen Estrada in testimony coupled with other facts that came to light established new issues, hitherto unknown, regarding the wiretap in"Fantuzzi" in 1970. These facts raised new grounds of attack of which the defense was not aware previously. These issues were immediately called to the court's attention (AB 14-19) in proper fashion to be considered as provided in Title 18 U.S.C. 2518(10).

The government does not answer the issues raised that they failed to truthfully inform judge Wyatt of the facts in 1970 establishing a logical alternative to wiretaping in Estrada and normal investigation. Nor do they even speak to the issue raised in United States v. Kalustian (AB 14-15).

The government makes no reply to appellant's argument that Dafney and Robert Schwartz should have been named in the original wiretap application and noticed as required by law. It is conceeded that Estrada, a reliable informant identified the Schwartzes and at least supplied probable cause for the government to believe they were"committing the offense for which this tap was sought" before the tap was ever applied for in 1970. In addition, she knew and informed the government that Kitty used her telephone to contact the Schwartzes regarding narcotics. Thus, there was more than a reasonable possibility that the Schwartzes would be overheard on Kitty's phone on which the "Fantuzzi" tap was placed. There is just no excuse in fact or law for the failure to name them and serve notice on them in 1970. (AB 16-18 ; United States v. Kahn, 415 U.S. at 155)

The government admits it changed the original "Fantuzzi" tape transcripts

and sought to use the new transcripts on this trial. The defense disputed these new translations and claimed that the old "Fantuzzi" transcripts were correct. The disputed transcripts were translations of conversations in a foreign language (Spanish) . They were supplied to the jury so that they would understand what the people on the tape were saying. The court itself recognized that the translations had more significance than the tapes themselves and were an important part of the government's proof on the trial. The court failed to follow the proceedures firmly established in this Circuit in deciding the issue (AB 18-19).

Judge Judd never made a finding at pages 1887 or 1939 (GB 22) that the Schwartzes were aware of the fact that Kitty Lopez's telephone was tapped in 1970 . Nor did judge Judd make any such finding during the trial of this case or at any post trial proceeding on the record,at which Mr. Schwartz was present.

POINT III PRE-INDICTMENT DELAY

The government rests it's pre-indictment delay response on the fact that Lucho did not become available until May of 1974 and the six months additional delay to indictment was to verify his story. The fact is the six months was used to rehearse or at least refresh the recollections of its witnesses and had nothing to do with verification, as the evidence indicated at trial(T 2521, 2761). However, the government says nothing of Claudine Lierros who starts cooperating in September 1973, 8 months before Lucho and 15 months before indictment, providing substantial direct narcotics information against the Schwartzes, all related to the "Fantuzzi" conspiracy and 1970 (T 2117 agent Tobin; T 1035-1198). Could the government know in 1973 that Lucho would cooperate 8 months later? Especially in view of their iron clad position that they never sought the cooperation of either Lierros or Lucho who simply decided this with the normal passage of time free from government contact of any kind.

The reason for this position was to counter the defense argument that the evidence at trial of the numerous, prolonged,"joint discussions" invloving the prospective testimony by the government witnesses was proof this case was manufactured.(T 2521). The government's answer was that these joint discussions were necessary because the passage of time had so dulled the memory of it's witnesses that they had to hold these sessions during which they examined documents, reports, tape transcripts and held inter-witness convesations to refresh their recollections of the events in 1970 (T 2761). What of the Schwartzes recollections of the events of late 1969 and early 1970, intentionally deprived of notice by the government in 1970, they had nothing to rely on but old and faded memory.

All of the foregoing adds strength to appellant's argument that the government by at least 3 to 4½ years intentional delay and total inaction set in motion a series of events that made it impossible for the Schwartzes to get a fair or defendable trial (AB 20-26).

In the 3 years to Lierros the die was already cast. Speaking to the government's position in footnote 14 (GB 23):

1. Jose Landetta. To determine Landetta's knowledge of the Texas cocaine it would have been wise for the government to re-read Landetta's testimony set forth in United States v. Fantuzzi, bottom of 685 through 686 (463 F.2d) and re-examine the "Fantuzzi" wiretap. Dallas was still in Texas in 1970 and Jose testified to the big cocane deal between Lucho, Bruno and Claudine; coupled with the undisputed trip of Lucho to Dallas in furtherance thereof which the wiretap further amplified as everything from Texas was for Bruno and Claudine, makes this position regarding Jose's knowledge baseless.

In addition the government makes no response to Jose's mysterious disappearance from government custody nor do they deny the wealth of

additional exculpatory information he possessed,(AB 22-23, 26,31).

There is one additional matter that must be mentioned at this juncture and that is the list of Lucho's customers that Estrada had in 1970 when Lucho went to Texas. The Schwartzes names should have been high on that list allegedly owing Lucho $21,000.00 at that time. However, the passage of time has dulled not only the Schwartzes memory but that of Estrada and agent Dugan as well. She cant remember if she copied and delivered the names and information thereon to Dugan. Dugan can't recall is she supplied him with a list of Lucho's customers or not or if he recorded the information in 1970. When the defense demanded the production of any such list in the government's possession, the response in 1975 was we don't know its whereabouts. Jose Landetta a person with real knowledge of the facts and the list is gone.

2. James Christian. Remaind silent in "Fantuzzi" because he contended that the government's evidence was both factually and legally insufficient to justify conviction. This court agreed with him and reversed the finding of judge Judd. However, his value to the defense in establishing the truth about the Texas cocaine and the fact that the Schwartzes had nothing to do with these peoples narcotics activties in 1970 was lost because the government would not seek a grant of immunity in a search for the truth.

3. Richard Wheeler. The defense established that Wheeler was part of the "Fantuzzi" conspiracy and had knowledge of the activities of some of the "Fantuzzi" defendants in 1970. He was alive in 1970 through 1972. He is dead. Had the Schwartzes at least been given notice of the wiretap he and others would have been available to them to show they were not involved with these people in establishing their innocence. Without notice of the tap the Schwartzes cannot be faulted for failing to seek out, interview or perpetuate evidence in 1970.

4. Andres Rodriguez. The defense sought Rodriguez to establish that he

never made any deliveries of narcotics to the Schwartzes for Lierros. The defense made every effort to locate Rodriguez who's importance looms even larger when one considers the governments present claim that delay in indictment was their attempt to corroborate and verify their witnesses. Yet, even though Rodriguez was and still is a defendant in a pending case in the Eastern District they never attempted to interview or locate him to corroborate Lierros.

5. Carmen (Kitty) Lopez. The name of Kitty's attorney was supplied after repeated attempts by the defense to obtain her address from the government which agent Dugan had (T 1790, 1795-96). Kitty did not appear in court on the day the trial began but on March 24, 1975 which date was supplied to her by the government. The Schwartzes and their attorneys' surprised by her mysterious appearance interviewed her and gained valuable information. She was supposed to wait in court until the proceedings of the 24th were over for further interview but after being approached by a couple of agents in the courtroom she disappeared. The defense didn't need to subpoena her because after the court was informed of the facts the government was instructed by the court to produce her(T 1796) which they never did. However, the goverinment makes no response whatever to the charge of prosecutorial misconduct in their attempt to suppress, pressure or influence Kitty's testimony through her attorney Mr. Rosencranz, who the defense called on the trial to establish the facts (T 2290-91, 2335-45 ; AB 24). Nor do they dispute the fact that Kitty had exculpatory evidence lost to the defense through the governments conduct (T 2130-31).

The intentional failure to name the Schwartzes in the wiretap application and notify them that they were the subject of wiretaps in 1970 coupled with the intentional delay on the part of the government in seeking this indictment, as set forth herein and in appellant's brief, not only shows prejudice but proves it.

POINT IV VARIENCE and VENUE (GB 24)

To understand the full impact of the Varience-Venue issue one must view the date of May 12, 1970 in overt act 2 (AB 27) with the 1972 grand jury testimony of Mr. Sepulveda in the Eastern District (AB 31-32) regarding May 12, 1970. Together with Mr. Schlam's written concession regarding overt act 2 in discovery on March 13, 1975 :

> " Overt Act II- the cocaine was received in the vicinity of the Chilean Line Pier, Columbia Street, Brooklyn; the time of the receipt was approximately between midnight and 1:00 A.M."

and Mr. Schlam's further representation on April 11, 1975 on this trial regarding venue and overt act 2 with respect to the grand jury and with respect to the Eastern District of New York :

> " In respect to the overt act which is alleged in the indictment, your honor, the fact that the cocaine which we allege was delivered to Mr. Schwartz came off the ships in Brooklyn, New York and was transported from Brooklyn to New York.(T 2003) "

1. The government at footnote 16 (GB 25) does not deny Borgono's perjury in the grand jury or their coverup thereof or that this perjured testimony was the only evidence that set venue in the Eastern District by vote of a grand jury that was lied to.

2. The government does not mention their " Brady" obligations in failing to inform the defense of these exculpatory facts during trial or during pre-trial in discovery when Mr. Schlam, on January 29, 1975, states in writing:

> " The government is unaware of any Brady material."

3. The government does not mention that the defense discovered the perjury months after conviction and sentence while incarcerated and immediately made the facts known to the court by affidavit in 75 C 1808 (AB 31-32).

4. The government does not mention that when accussed in 75 C 1808 in November, 1975, instead of coming foward truthfully Mr. Schlam chose not to reply at all to these serious allegation of misconduct, thereby compounding the wrong.

5. The government says nothing of Mr. Sepulveda's testimony before this grand jury and his perjury as well (AB 32) which they with knowledge also covered up.

6. The government did identify Borgono but only after demand from the defense and order of the court during the Rule 29 motion (T 2008).

7. The defense knowing nothing of the facts of any perjury at that time had no reason to call him on the trial. However, the government (Mr. Schlam) with knowledge chose to remain silent.

The other issues in this indictment and the underlying testimony thereof at trial were,in large measure, inextricably linked to this cocaine in overt act 2. Armed with the truth the defense would have destroyed the government' s case and the credibility of it's witnesses.

The proceedure for removing overt act 2 from this indictment and from the juries consideration was contrary to that established in the Circuit and error (AB 33). That proceedure is designed to prevent against the possibility of jurrors examining the deleted portions of an indictment and being prejudiced thereby. The government's statement that " appellant makes no claim any jurror saw Overt Act 2" is frivilous.

United States v. Downing (GB 25) is not a venue case and deals with a claim that a U.S. court does not have jurisdiction of a foreign conspiracy. The case simply recognizes the accepted principle that where delivery of the contraband is made within the U.S., the conspirators by a legal fiction are treated as renewing their agreement there and jurisdiction to prosecute exists in a U.S. court. The issue here is one of proper venue between the Southern and Eastern Districts securred by a fraud on a grand jury (AB 31-32).

In viewing the venue issue one must not forget the following:

a. The underlying facts that became overt act 2 of this indictment was the only evidence of venue presented to this grand jury in 1974, which the government now conceeds (AB 29 also 27-30).

b. That by abandoning all of this venue proof and the other facts that constituted overt act 2 on the trial,the court in striking this portion of the indictment was not removing mere surplusage(AB 31).

c. Permitting the government to add a new venue theory and proof thereof did not limit the indictment, it broadened it.

d. All of the above came about as a direct result of the government's calculated coverup to avoid exposing the perjury of it's witnesses.

POINT V RECUSAL (GB 26)

In determining whether there should have been recusal of the trial judge as provided in 28 U.S.C. 455 as more fully set forth in Appellant's Brief(37-39) the following additional facts should be considered:

1. The document set forth in the government's Addendum (GA 8a) are what is refered to in law and fact as a " Letter Rogatory" issued in accordance with 28 U.S.C. 1781 and 1782 and pursuant to Rule 28(b) Federal Rules of Civil Proceedure. Rule 28(b) provides " a letter rogatory shall be issued <u>on application and notice</u> ..... A letter rogatory may be addressed To The Appropriate Authority in (here name of country). "

2. That the proceedings in the instant case were <u>not on notice</u> but were secret, ex-parte proceedings in violation of law is not disputed.

3. The government's authority for issuance submitted to judge Judd is titled " Memorandum In Support Of An Application for Letter Rogatory".

4. This document is clearly not an international subpoena as provided in 28 U.S.C. 1783, applicable only to a U.S. national or resident presently in a foreign country.

5. Inherent in these secret proceedings is the findings that judge Judd had to make before signing the " Letter Rogatory":

a. The Schwartzes were engaged in narcotics, and

b. The Schwartzes deposited the proceeds of their narcotics activities in German Banks through Genther Philipps an attorney, and

c. Gunther Philipps was not acting as an attorney in this regard and no real priviledged attorney-client relationship existed between the Schwartzes and Philipps (AB 37) .

The government does not deny that there were joint discussions between them and the court in which the underlying facts were furnished him.

The fact that no evidence from the letters rogatory was received at the trial is not the issue (GB 26). One must be concerned with the effect this conduct has on the state of mind and impartiality of a judge who must, by delicate balance,decide issues addressed to credibility and discretion.

However, the matter does not end with the letters rogatory for there was the use pre-trial by judge Judd of extrinsic non-criminal documents against Mr. Schwartz, who had testified extersively before him with no cross-examination by the government. The court sua sponte, sought out and read the findings of a referee in suspension proceedings in 1968 and used this as a credibility yardstick against his testimony in 1975(see Rule 608(b) Rules of Evidence; AB 37-39; T 609-12, 748-51). Judge Judd admits during the trial that he went to the record of the suspension proceeding on his own volition during the pre-trial hearing in connection with the testimony of Mr. Schwartz. He further admits that he used facts in the record of those 1968 proceedings " as one of the factors" in determining against Mr. Schwartz's credibility who was not subject to cross-examination and who made no reference to those proceedings or the facts thereof in his direct testimony(T 1789).

If a jurror who was to decide factual and credibility issues disclosed he had, on his own volition, read certain damaging matters about a person who testified before him and wanted to use those facts, not supplied by proffer or cross-examination in judging that persons credibility, no one would quarrel with anyone who stated that because of this conduct his " impartiality was reasonably called into question". Nor would you be wrong in a challenge for cause. This is no less the case with a judge, except the application is for recusal(AB 38).

There appears to be additional evidence to establish that judge Judd was receiving secret, ex-parte information regarding the Schwartzes during pre-trial proceedings. This court's attention is directed to two docket entries on 3/21/75 which read " JUDD, J. order and affidavit of AUSA Schlam filed and ordered sealed." Somewhere in those secret papers lies a part of the answer. The government's obvious failure to even address this issue or mention these orders and affidavits appears to be evidence they support our position. This happens just before crucial hearingsof pre-trial motions which commenced on March 24,1975.

This court is invited to examine these secret orders and affidavits which the defense has never seen or been made aware of and make its own determination (AA item A Docket Entries, page B).

POINT VI THE $ 75,000 IN CASH (GB 27)

Although the indictment ran to the date of the end of the old law, April 1971. The last provable act in the indictment ended in July, 1970. None of the money seized bore a wrapper date within the actual conspiracy period or to April, 1971. None of the money seized was closely connected to these dates and any attempt to convey that impression is pure deception (T 1727). (AB 39-41)

POINT VII EVIDENCE OF SUSPENSION (GB 28)

This issue is best answered in Appellants Brief (AB 42) with the following additional facts from the trial record (T2353- 2361, especially 2356,2358, 2359).

POINT VIII MISPRISON OF A FELONY CHARGE (GB 29)

The misprison of a felony charge was wholly limited to the testimony of agent Bochichio and only arose because of it(GB 30 n.19). This is adequately covered in our brief (AB 43-44).

In the interest of brevity with full knowledge that if extensive comment is still required regarding the other issues raised in our brief we would be beating a dead horse, I would merely call this court's attention to one final point and that is in connection with the trial in absentia argument (AB 48). It is now undisputed that the date upon which this trial began, March 31, 1975 had not been previously scheduled as the day for trial.

Based upon the issues raised in Appellant's Brief, the concessions or the failure of the government to respond thereto and the matters stressed in this Reply Brief

THE CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED

Dated: February 20, 1976

Respectfully submitted,

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CERTFIFCATION OF SERVICE

I herby certify that on the 23rd day of February, 1976 I mailed a true copy of Appellant's Reply Brief to :

United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, N.Y. 11201

by depositing the same in the appropriate mail facility for that purpose at the United States Penitentiary, Lewisburg, Pennsylvania.

Dated: Lewisburg, PA.
February 24, 1976.

Robert B, Schwartz
Appellant pro se